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January 25, 2017

Sarah Flanagan, Esq.
Juan Fajardo, Esq.
Office of Regional Counsel
United States Environmental Protection Agency
Region II
290 Broadway
New York, New York 10007-1866

RE: Lower Passaic River; *De Minimis* Settlements

Dear Ms. Flanagan and Mr. Fajardo:

21st Century Fox America, Inc. (21CFA)¹ is a party to the Administrative Settlement and Order on Consent for Remedial Investigation/Feasibility Study; Lower Passaic River Study Area (LPRSA) portion of the Diamond Alkali Superfund Site. 21CFA also is a recipient of Region II's Remedial Design Notice Letter dated March 31, 2016 concerning the LPRSA.

We understand that EPA is considering offering some companies the opportunity to participate in a *de minimis* settlement or other settlement regarding the LPRSA (or some related area). 21CFA requests that it be included among the companies given that opportunity. 21CFA further requests that EPA identify the criteria for participation in any settlement so that 21CFA can demonstrate that it meets the criteria (if appropriate).

Additionally, 21CFA hereby petitions EPA for *de minimis* status under Section 122(g) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, (CERCLA), 42 U.S.C. § 9622(g)(a). For the reasons set forth below, 21CFA meets EPA's criteria for a *de minimis* settlement.

¹ 21CFA is the successor to News America Inc. and News Publishing Australia Ltd. Those entities were successors to Chris-Craft Industries, Inc.

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In brief, there is no credible evidence that 21CFA is responsible for any release of dioxins, furans, or polychlorinated biphenyls (PCBs) in the LPRSA. These are the hazardous substances EPA has determined are overwhelmingly driving the risk to human health and the environment in the LPRSA.

And even if certain dated and unsubstantiated allegations, that 21CFA's predecessors discharged extraordinarily small amounts of dioxin for a very short time to the Passaic Valley Sewerage Commission (PVSC) sewer system, were to be credited (they should not be), 21CFA still qualifies for and deserves *de minimis* treatment. With regard to these and the other hazardous substances identified as contaminants of potential concern (COPCs) or ecological concern (COPECs), namely various pesticides and metals, any discharges of such hazardous substances by 21CFA's predecessors were non-existent or extremely limited, and have not resulted in impacts to the Lower Passaic River that require remediation.

21CFA's predecessors are alleged to have owned and operated just one of the hundreds or even thousands of facilities that purportedly released various hazardous substances (not merely COPCs and/or COPECs) into the LPRSA. 21CFA is among the only seventy-three PRPs that since 2007 have spent more than \$100 million conducting the Remedial Investigation and Feasibility Study (RI/FS) for the LPRSA pursuant to the Administrative Settlement Agreement and Order on Consent, CERCLA Docket Number 02-2007-2009, May 8, 2007 (the RI/FS AOC). 21CFA also is among the seventy PRPs that conducted the removal and capping of contaminated sediment in the so-called River Mile 10.9 Study Area pursuant to a separate AOC at a cost in excess of \$20 million.

21CFA meets both of the two statutory criteria established by CERCLA Section 122(g) for *de minimis* treatment; *i.e.*, (i) "the amount of the hazardous substances contributed by that party to the facility" "is minimal in comparison to other hazardous substances at the facility;" and (ii) "the toxic or other hazardous effects of the substances contributed by that party to the facility" "is minimal in comparison to other hazardous substances at the facility."

First, it is beyond question that the amount of any hazardous substances contributed by 21CFA's predecessors to the LPRSA "is minimal in comparison to other hazardous substances at the facility." 21CFA's predecessors owned and operated a small chemical manufacturing facility at 100 Lister Avenue from approximately the late 1930s until 1972. In 1972, the facility was leased to an unrelated third party, Sobin Chemicals, Inc., and then was sold to Sobin Chemicals in 1974. After that time 21CFA's predecessors had no further involvement with the facility. 21CFA's predecessors did not discharge either production-related wastewaters, process waters or other wastes (*e.g.*, stormwater) directly to the Passaic

River. The facility was not adjacent to the river but rather was separated from it by other properties that were owned and operated by unrelated third parties. It is undisputed that both sanitary sewage and stormwater from the facility were discharged to the sewage system owned and operated by PVSC.² For these reasons, and in light of the known voluminous historical direct discharges of COPCs and COPECs to the river by companies such as Diamond Alkali the contribution of any hazardous substances for which 21CFA may bear responsibility is minimal in comparison to the total mass of hazardous substances in the LPRSA, and the first element of Section 122(g)'s *de minimis* directive is satisfied.

Second, it is readily apparent that the toxic or other hazardous effect of any substances contributed by 21CFA's predecessors to the LPRSA "is minimal in comparison to other hazardous substances at the facility." As EPA has made clear, this statutory criteria is met when a *de minimis* candidate's discharges "are not significantly more toxic and not of significantly greater hazardous effect than other hazardous substances at the facility."³ Any discharges from the facility that ever may have reached the Passaic River involved very small amounts (especially as compared to known direct discharges to the river) of some pesticides, plasticizers or similar chemical products. For example, DDT was produced at the facility for approximately six years beginning in 1945 but not discharged to the river; whereas the former owner-operators of the Diamond Alkali Superfund Site have been found by the New Jersey courts to have discharged massive amounts of DDT directly to the river over an extended time. Moreover, any hazardous substances discharged from

² EPA indicated previously that it is theoretically possible that sanitary sewage from the facility was transmitted on occasion to the river because of a purported "illegal cross-connection" (EPA's term in past correspondence) between one of PVSC's sanitary sewer lines and one of its storm sewer lines. Two points are important in this regard, however: (i) this theory is purely speculative and not based on any actual evidence that sanitary sewage from the facility ever was transmitted to the river in this fashion; more recent research by 21CFA's expert consultants evidences that the theory is unfounded and counterfactual (21CFA's expert consultants are prepared to meet with EPA and explain why this theory is baseless); and (ii) even if there were such an "illegal cross-connection," and even if sanitary sewage from the facility passed through it, this would be solely the responsibility of PVSC as the owner and operator of the sewer system and was not caused or contributed to by 21CFA's predecessors.

³ "Streamlined Approach for Settlements With *De Minimis* Waste Contributors under CERCLA Section 122(g)(1)(A)," OSWER Directive 98347-1D (July 30, 1993) (internal quotation of earlier EPA guidance omitted).

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the facility to the river are less toxic than the primary remedy drivers in the LPRSA (dioxins, furans and PCBs). And even if EPA were to credit earlier claims (none supported by admissible evidence) that small amounts of dioxin-containing wastewaters may have been discharged from the facility for a very short time to the PVSC sewer system – and to be clear EPA should not credit these unsubstantiated and baseless allegations – 21CFA still would qualify for *de minimis* treatment because such wastes are no more toxic than those discharged to the river in high amounts over an extended time from the Diamond Alkali Superfund Site. Accordingly, the second element of Section 122(g)'s *de minimis* directive is satisfied.

21CFA is prepared to cooperate with EPA in the development of an appropriate *de minimis* settlement process. As noted, 21CFA's consultants will be prepared to meet with EPA and to explain in whatever detail EPA would like why 21CFA qualifies as *de minimis*. 21CFA requests inclusion in any meetings or other communications that EPA has with any other PRP or PRPs relating to any *de minimis* (or *de micromis*) process or negotiations.⁴

We look forward to working with EPA to resolve this matter. I will appreciate your contacting me at your convenience to discuss the above. My direct dial number is 617-573-4880, and my email address is peter.simshauser@skadden.com.

Sincerely,


Peter Simshauser

⁴ This request and offer of cooperation is made with 21CFA fully reserving all rights to contest any liability under CERCLA and all other available defenses.